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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-77

State of Minnesota,
Respondent,

vs.

Robert Dayton Hitchcock,
Appellant.

Filed October 19, 2010
Reversed and remanded
Johnson, Judge

Hennepin County District Court
File No. 27-CR-08-25621

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Desyl L. Peterson, Minnetonka City Attorney, Anna Krause Crabb, Assistant City Attorney, Minnetonka, Minnesota (for respondent)

Samuel A. McCloud, Carson J. Heefner, McCloud & Heefner, P.A., Shakopee, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Robert Dayton Hitchcock drove a vehicle while he was intoxicated and collided with another vehicle. Hitchcock left the scene of the accident without giving his name, address, date of birth, and vehicle registration number to the driver of the other vehicle. Hitchcock pleaded guilty to all offenses charged in a six-count complaint. In this appeal, Hitchcock argues that the district court erroneously sentenced him on two convictions arising from the same behavioral incident. We agree and, therefore, reverse and remand.

FACTS

On April 21, 2008, A.M.T. was driving a Honda Civic in the city of Minnetonka in the southbound lane of County Road 101. As she was stopped at the intersection of that road and County Road 62, her vehicle was rear-ended by Hitchcock, who was driving a Dodge truck. A.M.T. and Hitchcock agreed that Hitchcock would follow A.M.T. to her home, which was a short distance from the scene of the accident. Hitchcock followed A.M.T. until she was approximately one block from her home, at which point he turned around and drove away. A.M.T. followed Hitchcock and called 911. Police officers apprehended Hitchcock and discovered that he had an alcohol concentration of .15. A.M.T. was treated at a hospital for her injuries.

The state charged Hitchcock with six offenses in connection with the incident. Pertinent to this case are count II and count VI. Count II alleged gross-misdemeanor criminal vehicular operation by causing bodily injury to another person while driving a vehicle with an alcohol concentration of .08 or more, a violation of Minn. Stat. § 609.21,

subds. 1(3), 1a(d) (Supp. 2007). Count VI alleged leaving the scene of an accident resulting in bodily injury, a violation of Minn. Stat. § 169.09, subds. 3(a), 14(c) (2006).

In October 2008, Hitchcock pleaded guilty to all six counts. At sentencing, the district court concluded that counts I, III, IV, and V merged with count II. The district court sentenced Hitchcock to 60 days in jail on count II and 25 days in jail on count VI.

In September 2009, Hitchcock moved to "de-certify" all convictions except the conviction on count II. At a hearing in October 2009, Hitchcock argued that the court administrator should not have certified to the Driver and Vehicle Services Division of the Department of Public Safety the convictions on the four merged counts. The state agreed, and the district court granted that part of Hitchcock's motion.

Hitchcock also argued that the court administrator should not have certified the conviction on count VI because his convictions on counts II and VI arose from the same behavioral incident. Hitchcock asked the district court to decertify the conviction on count VI. The state opposed this request. The district court denied Hitchcock's motion with respect to count VI.

Hitchcock appeals. The state did not file a brief in response to Hitchcock's brief. In a previous order, a special term panel of this court characterized Hitchcock's motion as a motion to correct sentence pursuant to rule 27.03, subdivision 9, of the Minnesota Rules of Criminal Procedure.

D E C I S I O N

Hitchcock argues that the district court erred by denying his motion to correct sentence with respect to count VI. He contends that the sentencing court imposed an

illegal sentence when it sentenced him for his conviction on count VI as well as his conviction on count II.

As a general rule, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (Supp. 2007). If a person is charged with multiple offenses, a court must determine whether the offenses "resulted from a single behavioral incident," in which event multiple punishment is prohibited. *State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 524 (1966). In the case of multiple traffic-related offenses, a single behavioral incident exists if the offenses "occur[red] at substantially the same time and place and [arose] out of a continuous and uninterrupted course of conduct." *Id.* at 405, 141 N.W.2d at 525. If the relevant facts are not in dispute, the question whether multiple offenses arise from a single behavioral incident is a question of law, to which we apply a *de novo* standard of review. *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006); *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

The supreme court has applied the above-described principles in two cases that are quite similar to this case. First, in *State v. Corning*, 289 Minn. 382, 184 N.W.2d 603 (1971), the defendant was charged with, first, driving under the influence of alcohol or drugs and, second, failure to stop and give information at the scene of an accident. *Id.* at 384, 184 N.W.2d at 605. The supreme court framed the issue as "whether the conduct charged in the two counts constitutes one behavioral incident." *Id.* at 384, 184 N.W.2d at 605. The supreme court concluded that the case "clearly falls within the rule of *State v. Johnson*." *Id.* at 386, 184 N.W.2d at 606. The supreme court added emphasis by stating,

"It is difficult to perceive how the two violations with which [Corning] was charged did not arise out of a continuous and uninterrupted course of conduct." *Id.* at 387, 184 N.W.2d at 606-07.

Second, in *State v. Gibson*, 478 N.W.2d 496 (Minn. 1991), the defendant was convicted of, first, criminal vehicular operation resulting in injury and, second, leaving the scene of an accident. *Id.* at 497. The district court imposed sentences on both convictions. *Id.* The supreme court held that the two convictions arose from a single behavioral incident. *Id.* The supreme court reached that result by applying a body of caselaw it described as "the avoidance-of-apprehension cases," which collectively stand for the proposition that "multiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." *Id.* The supreme court reasoned that Gibson's two convictions arose from a single behavioral incident because he "committed the felonious act of leaving the scene of an accident in part to avoid being apprehended for any crime committed in connection with the accident." *Id.*

The facts of this case are practically the same as those of *Corning* and *Gibson*. Hitchcock rear-ended A.M.T. and, shortly thereafter, left the scene of the accident without giving A.M.T. his name, address, date of birth, and vehicle registration number, as required by law. *See* Minn. Stat. § 169.09, subd. 3(a) (2006). Although Hitchcock agreed to follow A.M.T. to her home, he did not do so and attempted to flee. Similar to the defendant in *Gibson*, Hitchcock "committed the second offense in order to avoid apprehension for the first offense." *Gibson*, 478 N.W.2d at 497.

Furthermore, Hitchcock's two offenses "occur[red] at substantially the same time and place." *Johnson*, 273 Minn. at 405, 141 N.W.2d at 525. In *State v. Boley*, 299 N.W.2d 924 (Minn. 1980), the defendant committed the offenses of attempted burglary and escape from custody "within minutes of each other and in the same general area of each other." *Id.* at 926. Similarly, in *State v. Finn*, 295 Minn. 520, 203 N.W.2d 114 (1972), the defendant was alleged to have committed the offenses of unauthorized use of a motor vehicle and reckless driving "within 5 minutes over a distance of 3 miles." *Id.* at 522, 203 N.W.2d at 115. In both *Boley* and *Finn*, the supreme court concluded that the offenses arose from the same behavioral incident. *Boley*, 299 N.W.2d at 926; *Finn*, 295 Minn. at 522, 203 N.W.2d at 115. As far as the district court record reveals, Hitchcock committed the two offenses charged in count II and count VI within approximately the same time frame and approximately the same geographic area, as was true in *Boley* and *Finn*.

Thus, the district court erred by concluding that Hitchcock's convictions on count II and his conviction on count VI did not arise from a single behavioral incident. The appropriate remedy in this situation is an order vacating the lesser of the two sentences. *See Gibson*, 478 N.W.2d at 497-98; *Boley*, 299 N.W.2d at 926; *see also State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006). Because Hitchcock's conviction on count II is a gross misdemeanor and his conviction on count VI is a misdemeanor, Hitchcock is entitled to vacatur of his sentence on count VI. If the sentence on count II ever were vacated or reversed for other reasons, the district court would be permitted to re-impose the sentence on the conviction on count VI. *See State v. Pflepsen*, 590 N.W.2d 759, 766

(Minn. 1999); *State v. Wilson*, 539 N.W.2d 241, 247 (Minn. 1995); *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

In sum, the district court erred by denying that part of Hitchcock's motion to correct sentence in which he sought to vacate his sentence on count VI. Therefore, we remand to the district court for an appropriate order vacating that sentence and, in addition, an order directed to the Department of Public Safety to decertify Hitchcock's conviction on count VI.[1]

Reversed and remanded.

[1]In addition, we recommend that the district court review the file to ensure that the court administrator previously decertified the four specific convictions that the district court judge intended be decertified. Our review of the district court record reveals that the court administrator may have inadvertently decertified the conviction on Count II instead of the conviction on Count III.